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Corporation
[FILE 09-019946 PHH]

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:

THOMAS B. PRITZKER AND JOANNE M.
SUNQUIST,

Debtor.

MERRILL LYNCH CREDIT CORPORATION,
its assigns and / or successors-
in-interest,

Movant,

v.

THOMAS B. PRITZKER AND JOANNE M.
SUNQUIST, DAVID M. REAVES,
Trustee,

Respondents.

Case # 2:09-bk-22360-CGC

Chapter 7 Proceedings

**MOTION FOR RELIEF
FROM THE AUTOMATIC STAY**

Re: Real Property located
at 16502 Ringer Road
Wayzata, MN 55391

Merrill Lynch Credit Corporation, ("MERRILL LYNCH"),
through undersigned counsel, moves this Court for an Order
granting relief from the automatic stay of 11 U.S.C. § 362 and
any other limitations against lien enforcement against the
property, rents, issues, and profits of Thomas B. Pritzker and
Joanne M. Sunquist, ("Debtor"); or, in the alternative,
conditioning the use, sale, or lease of such property, rents,

1 issues, or profits as is necessary to provide MERRILL LYNCH with
2 adequate protection of its secured interest in certain real
3 property. This Motion is supported by the following Memorandum
4 of Points and Authorities.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 Statement of Facts:

7 1. MERRILL LYNCH is the holder or servicer of a
8 promissory note, ("MERRILL LYNCH Note"), made, executed, and
9 delivered by Thomas B. Pritzker and Joanne M. Sunquist, on or
10 about July 28, 2004 in the original sum of \$443,000.00. The
11 MERRILL LYNCH Note is secured by a Deed of Trust dated July 28,
12 2004, recorded as a lien in first position at Hennepin County
13 Recorder's Number 84088573 against certain real property, ("the
14 Property"), generally described as 16502 Ringer Road, Wayzata,
15 MN 55391 and legally described as:

16 LOT 5, BLOCK 1, WESTMARCH

17 True and correct copies of the MERRILL LYNCH Note and Deed
18 of Trust held by MERRILL LYNCH are attached hereto as Exhibits
19 'A', and 'B'.

20 2. The Debtor filed a Chapter 7 Bankruptcy petition on
21 September 10, 2009.

22 3. The regular monthly payments on the MERRILL LYNCH Note
23 falling due since October 2009 have not been paid.
24

1 4. The total outstanding debt owed on the MERRILL LYNCH
2 Note is now approximately \$446,153.39.

3 5. In accordance with the terms of the MERRILL LYNCH Note
4 and Deed of Trust, the MERRILL LYNCH Note is in default and,
5 accordingly, the entire unpaid principal balance together with
6 interest, late charges, and attorney's fees and costs may be
7 declared due.

8 6. In connection with the above-described default,
9 MERRILL LYNCH has incurred attorney's fees and costs to protect
10 its secured interest.

11 7. Upon information and belief, there is no equity in the
12 Property because the liens exceed the fair market value thereof.

13 8. Upon information and belief, the Property is not
14 necessary for an effective reorganization.

15 9. The secured interest of MERRILL LYNCH in the Property
16 has not been adequately protected, nor has MERRILL LYNCH been
17 offered adequate protection by the Debtor.

18 **Discussion:**

19 Bankruptcy Code § 362(d) provides for relief from the
20 automatic stay upon the request of a party in interest on either
21 of two grounds: (1) for cause, including lack of adequate
22 protection of an interest in the property; or (2) the debtor has
23 no equity in the property and the property is not necessary for
24 an effective reorganization of the debtor.

1 The party seeking relief from the stay has the burden of
2 proof only on the issue of the debtor's equity in the
3 collateral; any party opposing the requested relief has the
4 burden of proof on all other issues. 11 U.S.C. § 362(g).
5 Therefore, unless a party opposing relief produces evidence on
6 these issues, MERRILL LYNCH is entitled to relief without
7 presenting any evidence whatsoever. See, In re L.H. & A. Realty
8 Co., Inc., 57 B.R. 265 (Bankr. D. Vt. 1986).

9 I. LACK OF EQUITY IN THE PROPERTY

10 Bankruptcy Code § 362(d)(2) authorizes the court to lift
11 the automatic stay of an act against property where the debtor
12 has no equity in such property and the property is not necessary
13 for an effective reorganization. In re Diplomat Electronics
14 Corp., 82 B.R. 688 (Bankr. S.D.N.Y. 1988).

15 In determining whether there is equity in the property, all
16 encumbrances on the property, including all costs and fees must
17 be considered. In re McCall, 25 B.R. 199 (Bankr. E.D. Pa.
18 1982); In re Taylor, 28 B.R. 691 (Bankr. S.D. Ohio 1983); In re
19 Paolino, 68 B.R. 416 (Bankr. E.D. Pa. 1986); In re Rye, 54 B.R.
20 180 (Bankr. D.S.C. 1985).

21 Where the Court is determining the equity in the property,
22 it is immaterial whether all the lienholders join in their
23 request for relief from the stay. In re Nashua Trust Co., 73
24 B.R. 423 (Bankr. D.N.J. 1987). In addition, the valuation

1 assigned to the subject property must be reduced by an amount
2 sufficient to cover the creditor's estimated cost of liquidating
3 the property. La Jolla Mortgage Fund, 18 B.R. 283 (Bankr. S.D.
4 Cal. 1982).

5 In the instant case, MERRILL LYNCH alleges that there is no
6 equity in the Property and no prospect or intent to reorganize.
7 At the final hearing on this Motion, if any, MERRILL LYNCH will
8 produce evidence that there is no equity in the Property. Any
9 party opposing this Motion has the burden of proof on all other
10 issues. 11 U.S.C. § 362(g).

11 **II. RELIEF FOR CAUSE - Lack of Adequate Protection**

12 Even where the debtor has equity in Property, relief for
13 cause may be granted by the Court pursuant to 11 U.S.C. §
14 362(d)(1), for cause, including where the Creditor's interest in
15 the property is not adequately protected. In re Pliss, 34 B.R.
16 432 (Bankr. D. Or. 1983).

17 Any party opposing this Motion has the burden of proving a
18 lack of cause, even when the debtor asserts that the equity in
19 the property furnishes the creditor with adequate protection.
20 In re Kim, 71 B.R. 1011 (Bankr. C.D. Cal. 1987) (overruled on
21 other grounds).

22 The creditor's substantiated allegations that it is
23 entitled to relief for cause are sufficient for granting relief
24 if not refuted by the debtor. In re Marta Group, Inc., 33 B.R.

1 634 (Bankr. E.D. Pa. 1983). If the debtor fails to meet this
2 burden, the moving party is entitled to relief under §
3 362(d)(1). In re Kim, supra.

4 In the instant case, the Debtor has been in default under
5 the terms of the MERRILL LYNCH Note since October 2009. This
6 default constitutes cause under § 362(d)(1). Additionally, the
7 Debtor has not provided MERRILL LYNCH with adequate protection
8 of its interest in the Property. Failure to provide adequate
9 protection is also cause to lift the automatic stay.

10 **III. AUTOMATIC TERMINATION OF THE STAY AS A MATTER OF LAW**

11 The automatic stay is terminated as a matter of law 30 days
12 after this Motion is filed with the Court unless the Court,
13 after notice and a hearing, orders the stay continued in effect
14 pending the outcome of a final hearing on this Motion. 11
15 U.S.C. § 362(e).

16 **REQUEST FOR RELIEF**

17 For the foregoing reasons, MERRILL LYNCH respectfully
18 requests:

19 1. That all stays, including but not limited to, any
20 injunction, restraining order, and the automatic stay provided
21 by 11 U.S.C. § 362 be terminated or modified to permit MERRILL
22 LYNCH, the successor Trustee to the Deed of Trust, or such
23 persons as the Court may deem appropriate, to take any and all
24 action necessary and appropriate to enforce MERRILL LYNCH's

1 interest against the Property, including, but not limited to,
2 the right to declare all sums secured by the Deed of Trust to be
3 immediately due and payable; to exercise any assignment of
4 rents; to bring a foreclosure action in any Court of competent
5 jurisdiction; to notice, conduct or continue a judicial
6 foreclosure or Trustee's Sale; and to apply the proceeds
7 therefrom as authorized by the Deed of Trust and applicable
8 state law;

9 2. That pending final hearing on the merits hereof, an
10 Order may be entered permitting MERRILL LYNCH to record, mail,
11 post, and publish Notice of Trustee's Sale under the Deed of
12 Trust and state law, except that MERRILL LYNCH shall be directed
13 to postpone the Trustee's Sale from time to time as necessary
14 until this court grants further relief pursuant to 11 U.S.C. §
15 362(d) or (e), or until the automatic stay expires by operation
16 of law.

17 In the alternative, that MERRILL LYNCH be awarded adequate
18 protection of its interest in the Property, more specifically
19 that the Debtor be ordered to pay all amounts now in arrears
20 under the Deed of Trust; maintain monthly cash payments to
21 MERRILL LYNCH equal to the regular monthly payment amount for
22 the continued use and occupancy of the Property and to protect
23 the interests of MERRILL LYNCH; and further that MERRILL LYNCH
24 shall be granted immediate relief from the automatic stay for

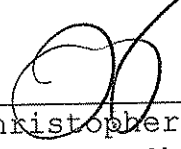
1 any failure by the Debtor to adequately protect MERRILL LYNCH's
2 interest in the Property or make the required payments;

3 3. That this Court's Order herein be binding on the
4 Debtor with respect to any subsequent conversion to another
5 chapter or subsequent filing of another bankruptcy petition by
6 the Debtor which may affect MERRILL LYNCH's interest in the
7 Property; and

8 4. For such other and further relief as this Court deems
9 just and equitable.

10
11 Respectfully submitted this 16 day of December, 2009.

12
13 Perry & Shapiro, L.L.P.

14
15 
16 Christopher R. Perry
17 Jason P. Sherman
18 Attorney for Merrill Lynch Credit
19 Corporation

20
21 Original filed this 17 day
22 of December, 2009 with:

23 United States Bankruptcy Court
24 230 N. First Ave., Suite 204
Phoenix, AZ 85003-1706

Copy of the foregoing was mailed
this 17 day of December, 2009 to:

Chapter 7 Trustee:
DAVID M. REAVES
PO BOX 44320

1 Phoenix, AZ 85064

2 Attorney for Debtor:
Dean Dinner

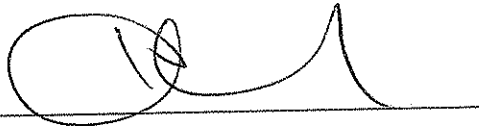
3 14500 N. Northsight Blvd. Suite 116
4 Scottsdale, AZ 85260

5 Debtor:
Thomas B. Pritzker and Joanne M. Sunquist
6 16502 Ringer Road
Wayzata, MN 55391

7

8

9 By

A handwritten signature, likely of Dean Dinner, is written over a horizontal line. The signature is cursive and stylized, featuring a large initial 'D' and a prominent peak at the end.

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